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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1302

JOHN T. DUNLOP, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellants,

vs.

TURNER ELKHORN MINING CO., ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Kentucky

MOTION TO AFFIRM

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
ARGUMENT	6
CONCLUSION	11

CITATIONS

Cases

Andrews v. Drew Mun. Sch. Dist., 507 F. 2d 611, 614 (5th Cir. 1975)	6
Carolene Milk Products Co. v. McLaughlin, 5 N.E.2d 447, 450 (Ill. 1936)	6
Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 644 (1974)	6
Edelman v. Jordan, 415 U.S. 651, 671 (1974)	10
Fusari v. Steinberg, ... U.S. ....., 95 S. Ct. 533, 539 n. 15 (1975)	10
Heiner v. Donnan, 285 U.S. 312, 325 (1932)	6
Juster Bros. v. Cristgau, 7 N.W.2d 501, 507 (Minn. 1943)	6
Leary v. United States, 395 U.S. 6, 31 (1969)	6

National Independent Coal Operators Association v. Brennan, 372 F. Supp. 16 (1974) 8

Owens v. Roberts, 377 F.Supp. 45, 52 (M.D. Fla. 1974) .. 6

Schlesinger v. Wisconsin, 270 U.S. 230, 239-40 (1926) .. 6

Stanley v. Illinois, 405 U.S. 645, 657 (1972) 6

Tot v. United States, 319 U.S. 463, 467 (1943) 6

U.S. Dept. of Agriculture v. Murry, 413 U.S. 508, 514 (1973) 6

Vlandis v. Kline, 412 U.S. 441, 446 (1973) 6

Miscellaneous

Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, as amended, 30 USC §§901, *et seq.* 2

Section 401, 30 USC §901 2

Section 402(b), 30 USC §902(b) 3

Section 402(d), 30 USC §902(d) 4

Section 411(c)(3), 30 USC §921(c)(3) 4

Section 411(c)(4), 30 USC §921(c)(4) 4

Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess., *Hearings on S. 2675, S. 2289, H.R. 9212* 3, 4

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Pursuant to Rule 16 (1)(c) of the Rules of this Court, appellees move to affirm Paragraphs (1) and (2) of the judgment order of the District Court. (J.S. App. B).

STATEMENT

This appeal arises out of an action brought by appellees in the District Court for the Eastern District of Kentucky

to enjoin the implementation and enforcement of Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150. Appellees have appealed to this Court from portions of the judgment below which are adverse to them (No. 74-1316, Jurisdictional Statement filed April 18, 1975). The instant appeal has been taken by the Secretaries of Labor and Health, Education and Welfare from the District Court's ruling that two sections of the legislation in question are inconsistent with the Act's intent and purpose, and violate rights guaranteed appellees by the Due Process Clause of the Fifth Amendment of the Federal Constitution.

In Title IV of the Coal Mine Health and Safety Act (hereafter, "Title IV") Congress has created a workmen's compensation program under which benefits are payable to present and former coal mine workers who are totally disabled by a single occupational disease known as coal workers' pneumoconiosis, or to the survivors of deceased mine workers who were totally disabled by the disease at the times of their deaths. Act, §401, 30 USC §901. Contrary to what the appellants would have this Court believe (See J.S. pp. 6-7), benefits are not payable under Title IV for disability arising from other respirable diseases, or from what might be considered sequelae of coal workers' pneumoconiosis. Neither is it true that Congress employed the term "total disability" in Title IV as "legislative shorthand" to express an intention to compensate mine workers who were not totally disabled within the meaning of the Act, as the appellants also would have this Court believe. (See J.S. pp. 16-17).

1. Legislative history leaves no doubt that Congress intended that compensation only be paid for disability

caused by the occupational disease known as coal workers' pneumoconiosis, which is defined in Title IV as ". . . a chronic dust disease of the lung arising out of employment in a coal mine." Act, §402(b), 30 USC §902(b). In 1971, it was proposed that Title IV be amended to cover disability from any respiratory or pulmonary disease or impairments and their sequelae arising out of employment in a coal mine.[1] Congress was aware that mine workers, along with some 25% of the adult males in the general population of the nation, were likely to suffer from, and be disabled by, nonwork-related pulmonary diseases such as chronic bronchitis and emphysema;[2] and there was substantial evidence before it showing it to be the overwhelming consensus of expert medical opinion that coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship.[3] The proposal to broaden the law was not enacted.

2. Appellants' assertion that Congress intended to compensate certain claimants regardless of their present ability to work (See J.S. p. 17) is belied by legislative history and the language of Title IV itself. Under Title IV as originally enacted, a mine worker was considered totally disabled if he was unable, by reason of pneumoconiosis, to engage in any substantial gainful activity. In 1972, over the appellants' objections, Congress broadened the defini-

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1 Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess., *Hearings on S. 2675, S. 2289, H.R. 9212*, 1-21 (Hereafter, *1972 Senate Hearings*).

2 *1972 Senate Hearings, supra* n. 1 at 381.

3 See, *e.g., 1972 Senate Hearings, supra* n. 1. at 375-85, 409, 442-50, 465-68, 552.

tion of "total disability" to cover claimants who, because of the disease, cannot or could not find comparable work suitable to their skills and abilities.[4] Congress did not, however, abandon the requirement that physical disability caused by the disease must be shown in order to qualify for benefits. The amended definition of "total disability" provides that:

> ". . . a miner shall be considered totally disabled when *pneumoconiosis prevents him* from engaging in gainful employment requiring skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Act, §402(d), 30 USC §902(d). (Emphasis supplied)

3. The portions of Title IV declared unconstitutional by the District Court pertain to and govern the evidentiary determination of whether a claimant is totally disabled by coal workers' pneumoconiosis. Section 411(c)(3), 30 USC §921(c)(3), raises an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis (or that his death was caused by the disease, or that he was totally disabled by it at the time of death from other causes), if it is established that he is suffering or suffered from a chronic dust disease of the lung. . .

> . . . which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to

[4] *1972 Senate Hearings, supra,* n. 1 at 28-29, 567.

> yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B). . . .

Section 411(c)(4), 30 USC §921(c)(4), raises a rebuttable presumption that a miner is totally disabled by the disease (or died of it, or was totally disabled by it when he died) if he was employed for fifteen years or more in mining and, in the absence of x-ray evidence of the disease, "other evidence" demonstrates the existence of a totally disabling respiratory or pulmonary impairment. The section further provides that this presumption may only be rebutted by proof that the miner does not or did not have the disease at all, or that if he suffers or suffered from a respiratory or pulmonary impairment, that it did not arise out of coal mine employment.

ARGUMENT

1. The correctness of the District Court's conclusion that the evidentiary limitations in question are unconstitutionally arbitrary and unreasonable is manifest, and should be affirmed by this Court without further consideration. The provisions of Title IV struck down by the Court are classic examples of a legislative attempt to enact into existence facts that do not exist in actuality, by compelling, in the case of the irrebuttable presumption in Section 411(c)(3), inference of a fact from proof of another when there is no rational connection between them, and, in the case of the rebuttable presumption in Section 411(c)(4), by unfairly limiting the opportunity to disprove the fact presumed. This Court and others have condemned such legislation as repugnant to the requirements of constitutional due process of law. See: *Cleveland Bd. of Ed.* v. *LaFleur*, 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry*, 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 657 (1972); *Leary* v. *United States*, 395 U.S. 6, 31 (1969); *Tot* v. *United States*, 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan*, 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 239-40 (1926). See also, *Andrews* v. *Drew Mun. Sch. Dist.*, 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts*, 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau*, 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin*, 5 N.E.2d 447, 450 (Ill. 1936). Congress has said in Title IV that in order for a miner to be entitled to benefits it must be determined that pneumoconiosis prevents him from engaging in gainful employment comparable to that in which he has engaged in the past, but the irrebuttable presumption of Section 411(c)(3) nevertheless bars mine operators from presenting evidence to show that a claimant is not disabled in that sense. Similarly, a mine operator may not rebut the presumption of Section 411(c)(4) by producing evidence that a claimant is or could be engaged in such employment, he must prove that the claimant does not or did not have the disease at all, or that any breathing impairment he does or did have is not associated with mine work. The District Court recognized that the limitations placed upon an operator's opportunity to prove that a claimant is not totally disabled within the meaning of the Act constitute ". . . a departure from the overall pattern of the Act which makes the existence of both the disease and disability two separate factors which must be established before liability is imposed" (J.S. App. A p. 9A, and see p. 11A), and properly concluded that these provisions were arbitrary and unreasonable.

2. Appellees have no quarrel with the proposition, advanced at pages 14-16 of the government's Jurisdictional Statement, that Congress possesses a broad authority under the Commerce Clause to legislate in the interests of the welfare of mine workers, but such enactments, like any other legislation, must comport with the requirements of due process of law, and are not immune to judicial scrutiny of the rationality of the means employed to achieve their ends, however legitimate those ends might be. What is more to the point—as the legislative history discussed at the outset of this motion shows—Congress did not intend for the compensation program created by Title IV to have the meaning ascribed to it in the tortured

analysis found at pages 16-19 of the government's Jurisdictional Statement. Appellants are merely asking this Court to assume the role of the legislature and rewrite Title IV (from what they would have the Court believe to be the "shorthand" notes of Congress) in a form that they hope would cure the irrationality of the provisions declared unconstitutional by the District Court.

3. This Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operators Association* v. *Brennan,* 372 F. Supp. 16 (hereafter, "the NICOA case"), does not foreclose consideration of appellees' motion to affirm, nor would it by any means support summary reversal of the decision in the instant case, as suggested by the appellants. (J.S. p. 21). Appellants' assertion that the *NICOA* case involved a challenge to substantially all the provisions of Title IV, their assertion that "the complaint aileged that the Act was a taking of property without just compensation, was a retroactive impairment of contracts and deprived the mine operators of due process of law," and their assertion that the District Court upheld the constitutionality of the Act (J.S. p. 9), seriously misrepresent the nature of that case, its holdings, and its precedential value.

The *NICOA* case was not even brought to challenge the constitutionality of Title IV, it was brought to challenge the validity of the regulations issued by the Secretary of Labor under the law, and the plaintiffs did not seek convocation of a three judge court. Their prayer for relief was that the court:

> "Declare that the aforesaid regulations and standards adopted by the Secretary of Labor for determining eligibility of miners and their dependents for black lung benefits under Part C of Title IV of the Act, for determining the responsible operator obligated to assure payment of such benefits, and requiring plaintiffs to provide medical benefits to miners receiving black lung benefits under Part B of Title IV of the Act, are contrary to the intent and purpose of the statute, and in their operation and effect will abridge substantive rights guaranteed to plaintiffs by the Constitution and laws of the United States, and will deny plaintiffs and other coal mine operators of their property without due process of law."

A three judge court was convened on the government's motion, apparently because one paragraph of the 21-paragraph, 17-page complaint read:

> 20. In the alternative, if the regulations and standards of the Secretary as hereinabove described are in fact within the authorization and intent of the Act, and the Act was intended to authorize imposition of liability upon plaintiffs for payment of black lung benefit payments, retrospectively for periods prior to the effective date of the Act, and on the basis of presumptions as to the fact of disability and causal relationship, the Act is to that extent unconstitutional and void and is in violation of the due process and equal protection guarantees of the Fifth Amendment of the Constitution of the United States.

The "opinion" of the District Court in the *NICOA* case consists merely of bare findings of fact and conclusions of law, unilluminated by a reasoned elaboration of the grounds of decision or citation of authority. The *NICOA* Court's statement that "Congress had the constitutional power to enact Title IV of the Act", is merely a jurisdictional finding preliminary to the Court's findings on the merits. 372 F. Supp. at 23. A holding that Congress had the constitutional *power* to enact the legislation in question

says nothing of the crucial issue in the present case, which is whether Congress has used that power in a way consistent with the Constitution. The only holding of the *NICOA* case that touches upon the evidentiary limitations in question here is to be found in the District Court's Conclusion No. 8 (372 F. Supp. at 25) which is patently a *non sequitur*:

> Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the statutory provisions pursuant to which the Secretary's regulations were promulgated do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law.

The District Court in the instant case was well aware of the *NICOA* decision and its inapplicability to the issues before it. (J.S. App. A p. 12A n. 5.)

The appellants' contention that the *NICOA* decision is a meaningful precedent upon which the issues in the instant appeal (as well as the cross-appeal in No. 74-1316) may be resolved, is technical fiction, and this Court should not be misled by it. Appellees respectfully submit that this Court, in its discretion, should consider its summary affirmance of the *NICOA* case as having little precedential value in the circumstances of the instant case. See the majority opinion in *Fusari* v. *Steinberg*, ... U.S. ....., 95 S. Ct. 533, 539 n. 15, and the concurring opinion of Burger, C. J., 95 S. Ct. at 540-541 (1975); and *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the First and Second Paragraphs of the judgment of the District Court should be affirmed.

Respectfully submitted,

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